Federal Court  Cour fédérale

Date: 20100119

Docket: T-587-09

Citation: 2010 FC 62

Vancouver, British Columbia, January 19, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

THOMAS PHIL DENNIS,
OF THE ADAMS LAKE BAND,
RESIDENT AND AN ELECTOR AND
ON BEHALF OF MY RELATIVES AND
OTHER ADAMS LAKE BAND MEMBERS

Applicants

and

THE COMMUNITY PANEL OF THE
ADAMS LAKE INDIAN BAND AND
THE CHIEF AND COUNCIL ELECT
FOR THE TERM DESCRIBED AS 2009

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Thomas Phil Dennis challenging a decision of the Community Panel of the Adams Lake Indian Band (Community Panel) by which his appeals of a Band Council election were dismissed. Mr. Dennis is a member of the Adams Lake Indian

Band (Band) and was an unsuccessful candidate in the Adams Lake Indian Band Council (Band Council) election held on February 14, 2009.

[2] Mr. Dennis has challenged the dismissal of his appeals on several grounds, but it is only necessary for the Court to consider his complaint that the Community Panel exceeded its jurisdiction by failing to maintain a quorum.

I. Background

[3] Mr. Dennis' appeals from the February 14, 2009 election were brought under the Adams Lake Secwepemc Election Rules (Election Code), which is a customary election code adopted by the Band in a referendum held on November 27, 1996. On the strength of the Band's decision, the Band Council asked the Minister of Indian Affairs and Northern Development (as he was then called) to exempt the Band from the election rules imposed under s. 74 of the *Indian Act*, R.S.C. 1985, c. I-5. The Minister acquiesced to this request and on November 25, 2000, he made an order (SOR/2000-409) which repealed an earlier order requiring elections of the Band to be conducted in accordance with the rules and procedures set out in the *Indian Act*. This history is briefly acknowledged in the preamble to the Election Code which states:

> Now it shall be known that the Adams Lake Indian Band has by way of a referendum of the Band's members repealed the election regulations established pursuant to section 74(1) of the *Indian Act* and has hereby approved, in accordance with section 2(1) of the *Indian Act*, the following Election Rules and procedures to govern the election of members to the Adams Lake Indian Band Council.

[4] Under the terms of the Election Code, appeals from Band Council elections can be brought on the basis of allegations of corrupt practices, a violation of the election rules that may affect the election results, or the ineligibility of a candidate. An election appeal is taken to the Community Panel, the composition and mandate of which is defined in Article 19 as follows:

> A Community Panel of five (5) persons shall govern and decide all proceedings held to dispute an election held in accordance with these Election Rules or any proceedings held to determine an application to remove a person from the office of Band Council. The Community Panel shall conduct their proceedings in accordance with this Part and with either Part VI or Part VII of these Election Rules. The Community Panel will also be responsible for determining eligibility based on the requirements stated in the Election Rules and approve the nominee's name to stand for election.

[5] In the event of a vacancy on the Community Panel, the Band Council is required by Article 21(e) to convene a general band meeting to fill the position. The Election Code makes no provision for a Community Panel quorum of less than five members.

[6] In accordance with the Election Code, five members of the Community Panel were selected by the Band on January 8, 2009.

[7] On January 24, 2009, a nomination meeting was held and nine candidates (including Mr. Dennis) were nominated for election to Band Council and three candidates were nominated for election to Chief. In the election of February 14, 2009, five members of Band Council were chosen. Mr. Dennis ran seventh and fell 22 votes short of the total received by the fifth elected candidate.

[8] On February 18, 2009, the Community Panel received Mr. Dennis' Notice of Appeal which alleged a number of breaches of the election rules. Five further appeals including another by Mr. Dennis were brought shortly thereafter.

[9] On March 5, 2009, the Community Panel commenced its investigation into the election appeals with interviews of the three electoral officers. This was followed on March 14, 2009 with submissions from all of the appellants including Mr. Dennis. On March 18 and 19, 2009, the Community Panel reconvened to consider the appeals. During the course of those deliberations, one of the members of the Community Panel abruptly resigned because of a disagreement with the process. That member's letter of resignation indicates that his motive was to frustrate the work of the Community Panel and to thereby place the appeals before "the community." The affidavit of Maryann Yarama describes what then took place:

> On March 19, 2009 mid-way through the Community Panel's voting process, at approximately 3:10 p.m., Rodney Jules tendered his resignation from the Community Panel. The remaining Community Panel members and I sought legal advice in regards to whether we should continue to vote on the alleged violations as a four member panel. We were advised that the Community Panel, as part of its governance power under the Rules, has the authority to determine if it shall continue as a panel of four members and to make decisions on all the Election appeals filed. We agreed to continue to vote on the alleged violations as a four member panel and to render our decisions on the appeals within the deadlines under the Rules.

On the same day the Community Panel rendered its decisions on the appeals. Although it found that some technical breaches of the election rules had occurred, those breaches were not found to be material to the election results and the appeals were all dismissed.

[10] The question before the Court is whether the Community Panel acted beyond its jurisdiction by proceeding to render its decisions in the absence of a full complement of five members.

II. Analysis

[11] No issue arises in connection with the jurisdiction of the Court to determine this matter because it is clear that the Community Panel is a federal board for the purposes of obtaining relief under s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7: see *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142, [1993] F.C.J. No. 446 (QL) (F.C.T.D.) at paras. 13-15.

[12] Whether the Community Panel was authorized to render its decisions in connection with Mr. Dennis' appeals in the absence of one of its members is an issue going to its jurisdiction and it must be reviewed on the basis of correctness: see *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 24 and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 50 & 59.

[13] It is well understood that the jurisdiction of a decision-maker is dependent upon the maintenance of a proper quorum from the beginning to the end of the adjudicative process. One of the leading authorities dealing with this issue is *Parlee v. College of Psychologists of New Brunswick* (2004), 2004 NBCA 42, 270 N.B.R. (2d) 375 where these principles were expressed in the following way at paras. 26-32 :

> 26 The following statement from the reasons given by Dickson J.A. (later Chief Justice of Canada) in *Inter-City Freightlines Ltd. v. Manitoba (Highway Traffic & Motor Transport Board)* at para. 6, summarized the governing legal principle:

> A quorum is the minimum number of persons required to constitute a valid meeting. In this case three members of the Board were required to constitute a valid meeting of the Board. In the absence of a quorum no business can be transacted, the meeting is a nullity. It would seem beyond cavil that the proceedings of the Board on June 15, June 16 and July 13 were a nullity.

27 This Court in *Re Cirtex Knitting Inc.* recognized this principle. In that case, it was submitted that the Chairman had resigned from the Board prior to a decision being given on preliminary objections. It was argued that the remaining two members had considered themselves capable of proceeding without the Chairman. However, the Court found that there was no evidence that the decision had been "arrived at when the Board was sitting otherwise than with a quorum present." In setting out his reasons, Limerick J.A. adds, however, at para. 26:

> If the decision of the Board were not a decision of the majority present and sitting as a quorum, i.e. the Chairman and two other members it would be a nullity... [Emphasis added.]

28 A more recent statement of the same principle can be found in the decision of the Federal Court of Appeal in *IBM Canada Ltd. v. Deputy Minister of National Revenue (Customs & Excise)* where Décary J.A. expounded upon the principle at para. 9:

> ... a perusal of the jurisprudence that has examined questions related to quorum indicates that the courts have consistently insisted on the necessity for a decision-making authority to strictly comply with quorum requirements at all times. A long series of cases have established a proposition which I would venture to formulate as follows: in setting a quorum and requiring that a minimum number of persons participate in a decision, Parliament reposes its faith in collective wisdom, does so for the benefit of the public as well as for the benefit of those who might be affected by the decision, and expects those who participate in the decision either as members of the majority or as dissenting members to act together up to the very last moment which is the making of one

> united, though not necessarily unanimous, decision. Having the proper quorum at all relevant times, from the beginning up to the very last moment is a question of principle, of public policy and of sound and fair administration of justice.
> [Footnotes omitted.]
>
> 29 It is simply indisputable that where the quorum is set by statute, the prescribed minimum number of members must carry out adjudication if it is to be valid, unless the statute specifically provides otherwise: see for example *Piller v. Assn. of Land Surveyors (Ontario)*. Once a quorum hears a matter, a majority may decide the issue: see s. 22(1)(d) of the *Interpretation Act*, R.S.N.B. 1973, c. I-13 and Reference *Re Tarriff Board Act*.
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> 30 In the present case, the relevant legislation and by-laws make no provision for the resumption of a hearing before a Discipline Committee short of the quorum. In fact, the wording of s. 11(2) of the Act clearly conveys the legislative intent that the quorum requirement must to be respected throughout.
>
> 31 Two questions remain: (1) is the governing legal principle applicable when the quorum is set by by-law as opposed to the governing statute, and (2) may the parties waive the quorum requirement?
>
> 32 Both counsel sought to distinguish the cases which apply the principle requiring strict adherence to quorum requirements from the present one on the basis that the quorum requirement is not set out in the Act, but is instead prescribed in the General By-laws. With respect, such a distinction is more illusory than real.

[14] The failure to observe a quorum requirement cannot be excused or waived by the parties and the resulting decision will be a nullity: see *Parlee*, above, at para. 36.

[15] Because of the strictness of the quorum requirement, most statutes or by-laws by which decision-making bodies are constituted make alternative provisions for the loss of members.

Section 22 of the *Interpretation Act*, R.S.C. 1985, c. I-21, provides an example of this by authorizing a reduced quorum for a body established under federal enactment. That provision states:

22. (1) Where an enactment requires or authorizes more than two persons to do an act or thing, a majority of them may do it.	22. (1) La majorité d'un groupe de plus de deux personnes peut accomplir les actes ressortissant aux pouvoirs ou obligations du groupe.
(2) Where an enactment establishes a board, court, commission or other body consisting of three or more members, in this section called an "association",	(2) Les dispositions suivantes s'appliquent à tout organisme – tribunal, office, conseil, commission, bureau ou autre – d'au moins trois membres constitué par un texte :
(a) at a meeting of the association, a number of members of the association equal to,	a) selon que le texte attribue à l'organisme un effectif fixe ou variable, le quorum est constitué par la moitié de l'effectif ou par la moitié du nombre de membres en fonctions, pourvu que celui-ci soit au moins égal au minimum possible de l'effectif;
(i) if the number of members provided for by the enactment is a fixed number, at least one-half of the number of members, and	
(ii) if the number of members provided for by the enactment is not a fixed number but is within a range having a maximum or minimum, at least one-half of the number of members in office	

> if that number is
> within the range,
>
> constitutes a quorum;

[16] The Respondents argue that the quorum provision in s. 22 of the *Interpretation Act* applies here because the Election Code constitutes an "enactment" as that term is defined in ss. 2(1) of that Act[1]. This argument would only succeed if the Election Code was made in the execution of a power conferred either under the *Indian Act* or by the authority of the Governor-in-Council. The problem for the Respondents is that the Election Code is not a creature of the *Indian Act*, but was made under the inherent authority of the Band. Section 74 of the *Indian Act* creates an exception to the right of a band to establish its own election rules by requiring the Minister to issue an order before the *Indian Act* rules can apply to band elections. In short, the *Indian Act* does not confer upon a band the right to establish its own election rules; it merely removes the inherent right of a band to do so by ministerial order.

[17] The fact that the Minister may review a custom election code under the Department's *Conversion to Community Election System Policy* before he makes an amending order under s. 74 of the *Indian Act* does not mean that such a code is thereby made in the execution of a power conferred by or under the authority of the *Indian Act*.

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[1] "Enactment" in ss. 2(1) of the *Interpretation Act* can mean a "regulation" and "regulation" is defined to include "an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (a) in the execution of the powers conferred by or under the authority of an Act, or (b) by or under the authority of the Governor-in-Council".

[18] It is only where a band election is governed by the *Indian Act* rules that the quorum provision in the *Interpretation Act* would apply. There is nothing untoward about this because it is up to each band to determine the measures that ought to be applied to its elections, including election appeals. The Adams Lake Indian Band has done that and, absent a *Charter* breach, it is not the role of the Court to rewrite those rules. Indeed, it would be presumptuous for the Court to assume that the clear stipulation of a five-member Community Panel was anything other than deliberate or that, after removing band elections from the purview of the *Indian Act*, the Band was indirectly relying upon s. 22 of the *Interpretation Act* as the means for modifying the stated quorum of five.

[19] The Respondents also argued that it was open to the Community Panel to act as it did because, under Article 22 of the Election Code, it was authorized to establish its own rules of conduct. I do not agree that the decision in *Faghihi v. Canada (Minister of Citizenship and Immigration)* (1999), [2000] 1 F.C. 249, 173 F.T.R. 193 (F.C.T.D.), affirmed (2001), 2001 FCA 163, 274 N.R. 358 supports this argument. The Court in *Faghihi*, above, expressly held that the statutory scheme it was reviewing did not require a two-member panel to deal with a motion which was said to be on the periphery of its jurisdiction. In other words, the quorum requirement of one member had been met in that case. It was then left to the decision-maker to determine whether the appointment of an additional member was warranted.

[20] Although a decision-maker's authority over procedure is often liberally applied, its scope is not broad enough to cure jurisdictional deficiencies or breaches of the duty of fairness. The

maintenance of a proper quorum is a fundamental jurisdictional requirement that cannot be excused by the right of a decision-maker to determine its own procedure or, as noted above, by the consent of the parties.

[21] The Respondents point out that the strict enforcement of a quorum requirement in this case will create some political uncertainty and impose administrative burdens on the Band. The Election Code, however, recognizes the right of the present Band Council to continue to function in the face of an election appeal. While there will certainly be some added costs and inconvenience arising from reconvening the Community Panel to rehear Mr. Dennis' appeals, that is the price that is paid to ensure that this important jurisdictional requirement set by the Band is fulfilled. These are not considerations which ought to stand in the way of the grant of discretionary relief in this case.

[22] I would only add that there is no evidence before me that the Community Panel which dealt with these appeals acted unfairly or inappropriately. The members sought legal advice and were advised that they could continue. They proceeded diligently to determine the appeals in a timely way and they were naturally concerned that the investigation they had conducted not be wasted by the unfortunate and very late resignation of one member.

[23] Given the apparent good faith of the Community Panel, there is no reason why the four members who participated in this process should be excluded from participating again if they so choose and the Band agrees. However, it is up to the Band to reconstitute the Community Panel for the purposes of reconsidering Mr. Dennis' appeals.

[24] Mr. Dennis is entitled to an award of costs in recognition of his success on this application. Costs are awarded to him in the amount of $1,500.00 inclusive of disbursements payable by the Respondents or either of them.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed and the decisions of the Community Panel with respect to the Applicant's appeals are set aside. Mr. Dennis' appeals must be re-determined on the merits by a newly constituted Community Panel. The Respondents shall pay the Applicant's costs in the amount of $1,500.00 inclusive of disbursements.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THOMAS PHIL DENNIS et al. v. THE COMMUNITY PANEL OF THE ADAMS LAKE INDIAN BAND et al.
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APPEARANCES:

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Alfred Kempf	FOR THE RESPONDENT Chief and Council Elect For the Term Described as 2009

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